

ARORA (Migration) [2017] AATA 1845 (29 September 2017)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Prince Arora

CASE NUMBER: 1616027

DIBP REFERENCE(S): BCC2014/3413020

MEMBER: Moira Brophy

DATE: 29 September 2017

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 29 September 2017 at 10:58am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Genuine and continuing relationship – Relationship for 12 months prior to application – Inconsistent evidence – Limited evidence of shared finances – Limited awareness of family members

LEGISLATION

1. *Migration Act 1958*, ss 5CB, 5F, 65, 359A
Migration Regulation 1994, Schedule 2 cl 820.211, cl 820.221, r 1.15A

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision of a delegate of the Minister for Immigration on 15 September 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 10 December 2014 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant was the spouse of the sponsor as defined in section 5F and 5CB of the Migration Act.
5. The applicant, Mr Prince Arora appeared before the Tribunal on 26 June 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Ms Ursula Butcher. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
6. The applicant was represented in relation to the review by his registered migration agent.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

Background

8. The applicant, Mr Prince Arora is a 35 year old male from India. He was previously married to Monika Sharma in the period from August 2007 to June 2010. His parents, one brother and one sister reside in India. He has one sister residing in Australia.
9. The sponsor, Ms Ursula Butcher is a 35 year old female who was born in Australia. She was previously in a defacto relationship in the period from 2006 to 2009. She has two sons born on 25 June 2008 and 28 June 2010. Her parents are deceased and she has two sisters residing in Australia.
10. On their application the parties stated they met in April 2013 outside the house the sponsor was living in at the time. They committed to a shared life together to the exclusion of all others on 31 December 2013 when the sponsor proposed. They married on 9 September 2014. They lodged an application on 10 December 2014 for a Partner (Temporary) (Class UK) (Subclass 820) visa.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in the present case is whether the visa applicant and the sponsor were in a genuine and continuing relationship at the time of application and continue to be in a genuine and continuing relationship at the time of this decision.

12. In making its findings, the Tribunal has considered documents contained in the Department and Tribunal files and oral evidence provided by the visa applicant and sponsor at the hearing.
13. There were a number of inconsistencies in the evidence given at the time of hearing and these inconsistencies were put to the parties following the hearing in accordance with section 359A of the Act. The Tribunal explained the relevance and the consequences of relying on that information. The discrepancies were as follows:
- The sponsor said the rent on the unit the visa applicant and the sponsor lived in was \$250 per week (\$500 per fortnight). This was not consistent with the evidence of the visa applicant that they paid \$290 per week.
 - The sponsor told the Tribunal she pays the rent on the unit at the front office and she pays from her bank account. She said the sister of the visa applicant helps out with the payment of the rent if she is short and she generally contributes \$200. This was not consistent with the evidence given by the visa applicant that he pays the rent fortnightly at the office at the front of the building, he went on to say he generally pays in cash but sometimes if he is short he pays from his bank account.
 - The sponsor said her son Casey was not in her care but he was in the care of her cousin's sister Selina. This was not consistent with the evidence of the visa applicant that the son of the sponsor was in the care of her sister.
 - The sponsor told the Tribunal she has two sisters but she does not have any brothers. This was not consistent with the evidence of the visa applicant that the sponsor has two sisters and one brother who lives about five hours away from Alice Springs. The visa applicant said he had last seen the brother of the sponsor about 18 months ago but the sponsor had been to visit him four or five months ago.
 - The sponsor said she had a sister called Leticia and she has two children. This was not consistent with the evidence given by the visa applicant that the sister of the sponsor named Leticia did not have any children.
14. The visa applicant was given the opportunity to address those inconsistencies as outlined above. A further submission was received on 7 August 2017. Those submissions have been taken into account and where relevant will be referred to below.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

15. Clauses 820.211 and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
16. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances

of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

17. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage on 9 September 2014 and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

18. *Financial*
19. The applicant told the Tribunal the parties are currently living in rented accommodation. They pay \$290 per week which includes utilities. They have lived there for around two years. The evidence as to how the rent is paid was equivocal. It would seem from the receipts provided that some amounts are paid in cash and others by eftpos out of an account in the name of the applicant.
20. The applicant is currently employed on a casual basis as a taxi driver and prior to that he worked in an Indian restaurant. He works four to six days per week, from 3.30 pm until midnight. On weekends he works longer hours. He is paid \$500 to \$700 per week in cash. The sponsor told the Tribunal she is in receipt of newstart allowance from Centrelink. She receives \$500 each fortnight. She told the Tribunal she was not in receipt of any other monies from Centrelink. Her Centrelink income is paid into an account in her name.
21. The applicant has an account in his name and the sponsor is not able to access that account. He also has a credit card with Westpac. The sponsor does not have access to this account and she does not have access to a small savings account he has with Westpac. The parties have a joint account which was opened in the week prior to the hearing. They previously had a joint account which was closed by the sponsor as she said it was a source of tension as the visa applicant was reluctant to deposit funds into that account. The applicant pays for groceries from cash.
22. There was no evidence of joint assets or liabilities. Apart from the rent there was no evidence of shared financial obligations.
23. After consideration of all of the available evidence regarding the financial aspects of the parties' relationship, the Tribunal finds it is not indicative of parties who are a couple in a genuine and ongoing relationship.
24. *Nature of the household.*
25. The parties gave consistent evidence they had resided together since they married in December 2014. They initially resided in a house previously rented by the applicant and they then moved into the house where they are currently living.
26. At the time of hearing the parties gave consistent evidence they share the housework, the sponsor does the washing and they share the cooking.

27. The parties gave evidence that they share a bedroom and the son of the sponsor sleeps on the couch in the living area.
28. The Tribunal accepts the parties reside as part of the one household. However the Tribunal was not convinced on the evidence the parties were living together in a genuine relationship.
29. On the basis of the evidence the Tribunal was not able to distinguish between a situation where the applicant and sponsor are living as a couple, or alternatively one where the applicant and the sponsor were sharing a home until the applicant obtained a visa.
30. *Social Aspects of the Relationship*
31. At the time of application the applicant and his sponsor provided two relationship statements, one from the sister of the sponsor and another from the sister of the applicant. Those statements very briefly stated both parties were known to them and they spent time with them socially since they married in September 2014. The Tribunal accepts on the basis of the statements and the photographic evidence that the parties have socialised together with members of their immediate families and some mutual friends.
32. After considering all the information regarding the social aspects of the parties' relationship, the Tribunal is satisfied their relationship is supported by their families and some friends. The Tribunal is not satisfied the parties have established that at the current time they present to the community at large as two people in a genuine relationship.
33. In weighing all of the available evidence regarding the social aspects of the parties' relationship, the Tribunal finds it is indicative of a couple in a genuine relationship.
34. *Nature of the commitment*
35. The evidence as to the parties commitment to each other was, when considered in its totality confused and unconvincing. There were a number of inconsistencies in the parties' oral evidence and these mainly related to financial and family issues. The lack of knowledge of those matters displayed by the applicant was not indicative of person in a genuine relationship.
36. The parties were not able to give specific evidence as to who paid the rent, how it was paid and when it was paid. The Tribunal does not regard it as plausible the parties would not remember with some specificity such important details of such a significant expenditure from their weekly budget especially given they were both on limited incomes. Those inconsistencies in the evidence were put to the visa applicant after the hearing in accordance with the requirements of section 359A and the Tribunal has considered the explanations provided. The Tribunal does not regard the explanation given to be persuasive. Conflicts and lack of specificity in the evidence about such events are in the Tribunal's view either indicative of the event not taking place or it not taking place in the manner described.
37. The visa applicant was not able to recall with any specificity where the sponsor's son Casey currently was staying and with whom. The Tribunal does not regard it as plausible that the visa applicant who claimed at the time of application to have established close bonds with the sons of the sponsor would not know into whose care Casey had been placed. The Tribunal was concerned there was a lack of candour in the giving of the evidence by both parties in an attempt to present their relationship as being a genuine and continuing relationship. The Tribunal regarded the submissions as attempts to

reconstruct evidence in a more favourable light. The Tribunal is mindful it is the ability to recall the minutiae of daily events, as being indicative of a genuine and continuing relationship, where parties are as they claim to be members of the same household.

38. The visa applicant was not able to recall the details of the sponsor's siblings. He gave evidence of her having a brother and of their having contact with the brother. The sponsor gave evidence she did not have a brother. Her evidence was corroborated by her family details provided at the time of application where it was stated she had two sisters. The explanation put forward by the visa applicant when that matter was raised in accordance with section 359A is simply not credible. The Tribunal accepts it may be possible in the context of a hearing to confuse the names of the sisters but not to confuse whether or not the sponsor has a brother. The Tribunal places considerable weight on this evidence as it indicates either the parties do not communicate as claimed or they do not know each other as well as parties in a committed relationship would.
39. The Tribunal regarded the cumulative effect of the inconsistencies in the evidence of the parties as outlined above (especially the inconsistencies in the financial matters and the evasiveness and lack of specificity in the evidence given by the parties in relation to these matters) as being indicative of the relationship not being characterised by a mutual commitment to a shared life together. The Tribunal places considerable weight on this evidence as it indicates either the parties do not communicate as claimed or they do not know each other as well as parties in a committed relationship would.
40. There is insufficient evidence before the Tribunal to indicate that the applicant and her sponsor have lived together in a genuine and continuing relationship, that they provide one another with companionship and emotional support, or that they see the relationship as long-term.
41. The Tribunal is not satisfied that the parties were, at the time of application, or are currently in a genuine spousal relationship. The Tribunal is not satisfied on the evidence that the applicant and her sponsor are committed to a shared life as husband and wife to the exclusion of all others.
42. **CONCLUSION**
43. Given the above findings, the Tribunal is not satisfied that at the time the visa application was lodged and at the time of this decision the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. There is no evidence to establish the parties do not live together at the present time at the same residential address. However the Tribunal is not persuaded on the evidence the applicant resides at this location in a committed relationship with the sponsor, rather than as an individual person who is not in a committed relationship.
44. Upon considering the evidence before the Tribunal and on the basis of the findings previously made the Tribunal is not satisfied the applicant has established he is currently living in a genuine and committed spousal relationship with the sponsor.
45. Given these findings the Tribunal, on balance, is not satisfied that at the time of this decision the parties are in a genuine relationship.
46. Therefore, the applicant does not meet cl.820.211(2)(a) and therefore does not meet the requirements of cl.820.211. Consequently, he cannot meet cl.820.221.
47. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

48. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

49.

Moira Brophy
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

(1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or
- (b) a Partner (Provisional) (Class UF) visa; or
- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
- (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.

(4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

